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No. 80-1431

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

IN THE MATTER OF R_____ M. J_____
Appellant

On Appeal from the Supreme Court of Missouri

APPELLANT'S BRIEF

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QUESTIONS PRESENTED

1. Whether, consistent with the First Amendment, applied to the states through the Fourteenth, a state may adopt and enforce a court rule listing the exclusive categories of information which are permissible in lawyers' advertisements in the printed media, and forbidding use in advertising of matter not expressly authorized by the rule.

2. (a) Whether, consistent with the First and Fourteenth Amendments, a state supreme court may discipline a lawyer for including in advertisements the concededly accurate and non-misleading information that he is licensed to practice in two states, that he is admitted to practice before the Supreme Court of the United States, and that he practices in areas of law such as "personal injury," "contract," and "securities and bonds," which designations are not among those explicitly approved by the state authorities.

(b) Whether, consistent with the Commerce Clause, a state supreme court may discipline a lawyer for publishing, in a telephone directory which circulates in adjoining states, the truthful information that he is licensed to practice in both states.

3. Whether, consistent with the First and Fourteenth Amendments, a state supreme court may discipline a lawyer for mailing a simple announcement of the opening of his office to persons with whom he is not acquainted, on the basis of a court rule limiting the mailing of announcements to "lawyers, clients, former clients, personal friends and relatives."

PARTIES TO THE PROCEEDING

The appellant, R_____ M. J_____ is a lawyer who was disciplined by the court below. That court ordered that his full name not be used in the official reports of the case and not be released to the media. The Clerk has been advised as to his full name and address.

The appellees are members of the Advisory Committee of the Missouri Bar, established by Rule 5 of the Supreme Court of Missouri, who filed an information in that court seeking disbarment of the appellant. They are Harold W. Barrick, Chairman, Owen W. Anglum III, Spencer J. Brown, Lynn M. Ewing Jr., Frank P. Sebree, Fred H. Mayer, Robert C. Smith Jr., and Donald J. Stohr.

Because the case presents issues of constitutionality of rules of the Missouri Supreme Court, 28 USC Sec. 2403(b) may be applicable and copies of the Notice of Appeal and Jurisdictional Statement have been served on the Honorable John Ashcroft, Attorney General of Missouri, pursuant to this Court's rule 28.4(c.) He declined to participate in the case.

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Other Materials

Andrews, Lori B. Birth of a Salesman: Lawyer Advertising and Solicitation, Chicago, ABA Press, 1980 . 12,22

OPINIONS BELOW

The opinion of the Supreme Court of Missouri (A-1)[1] together with the dissenting opinions of Bardgett, Ch. J. (A-5) and Seiler, J. (A-10) is reported 609 S.W.2d 411. The case was filed originally in the Supreme Court of Missouri, and there are no other opinions.

JURISDICTION

The opinion of the Supreme Court of Missouri was filed and judgment privately reprimanding the appellant and directing him to pay costs was entered on December 15, 1980. Motion for rehearing (A-31) was denied on January 5, 1981.

Notice of Appeal to this Court was filed in the Supreme Court of Missouri on January 9, 1981. The appeal was docketed on February 23, 1981 and probable jurisdiction noted June 1, 1981.

This case involves the constitutionality of Rules DR 2-101-(B) and DR 2-102 of Rule 4 of the Supreme Court of Missouri, and the decision of the court below is in favor of the constitutionality. Such rules are considered statutes under 28 USC Sec. 1257(2). See Bates v. Arizona, 433 US 350 (1977); In re Primus, 436 US 412 (1978); Ohralik v. Ohio, 436 US 447 (1978.) This Court, therefore, has jurisdiction under 28 USC Sec. 1257 (2).

CONSTITUTIONAL PROVISIONS AND COURT RULES

Constitution, Article I, Section 8

The Congress shall have power:... To regulate commerce ... among the several states.

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[1] This Court has allowed the parties to dispense with the printing of a Joint Appendix, since neither side considered it necessary to print any material which was not appended to the Jurisdictional Statement. References to that appendix are preceded by A-. There are also references to the Exhibits to the Stipulation (Stip.) on which the case was presented to the court below.

First Amendment

Congress shall make no law...abridging the freedom of speech or of the press ... .

DR 2-101-(B), Rule 4, Supreme Court of Missouri

A lawyer shall not, on behalf of himself, his partner, associate or any other lawyer affiliated with him or his firm, use or participate in the use of any form of public communication respecting the quality of legal services or containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim.

In order to facilitate the process of informed selection of a lawyer by potential consumers of legal services, a lawyer may publish, subject to DR 2-103, the following information in newspapers, periodicals and the yellow pages of telephone directories distributed in the geographic area or areas in which the lawyer resides or maintains offices or in which a substantial part of the lawyer's clientele resides, provided that the information disclosed by the lawyer in such publication complies with DR 2-101(A), and is presented in a dignified manner:

1) Name, including name of law firm and names of professional associates; addresses and telephone numbers;

2) One or more particular areas or fields of law in which the lawyer or law firm practices if authorized by and using designations and definitions authorized for that purpose by The Advisory Committee;

3) Date and place of birth;

4) Schools attended, with dates of graduation and degrees;

5) Foreign language ability;

6) Office hours;

7) Fee for an initial 30-minute consultation;

8) Availability upon request of a schedule of fees;

9) Credit arrangements for payment of fees will be given consideration;

10) The fixed fee to be charged for the following specific routine legal services:

1. An uncontested dissolution of marriage;
2. An uncontested adoption;
3. An uncontested personal bankruptcy;
4. An uncomplicated change of name;
5. A simple warranty of quitclaim deed;
6. A simple deed of trust;
7. A simple promissory note;
8. An individual Missouri or federal income tax return;
9. A simple power of attorney;
10. A simple will;
11. Such other services as may be approved by The Advisory Committee; the description of which would not be misunderstood or be deceptive, provided that the statement discloses that the quoted fee will be available only to clients whose matters fall into the services described and that the client is entitled without obligation to a specific estimate of the fee likely to be chaged in

print size at least equivalent to the largest print used in setting forth the free information.

Missouri Bar Advisory Committee Rule

ADDENDUM TO DR2-101(B)(2)

Pursuant to the direction and authority of DR2-101(B)(2) of the Order of the Supreme Court of Missouri entered October 24, 1977, effective January 1, 1978, the Advisory Committee adopts and promulgates the following rules and regulations for advertising by the legal profession in Missouri to be effective simultaneously with the Order of the Supreme Court on January 1, 1978.

* * *

III. Subject to DR2-101(A) and (B), the folowing areas for fields of law may be advertised by use of the specific language hereinafter set out:

1. "General Civil Practice"
2. "General Criminal Practice"
3. "General Civil and Criminal Practice."

If a lawyer or law firm uses one of the above, no other area can be used except specialties under Paragraph I.[2] If one of the above is *not* used, then a lawyer or law firm can use one or more of the following:

1. "Administrative Law"
2. "Anti-Trust Law"

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[2] Although Paragraph 1 of the Addendum refers to "specialists ... under procedures established by the Supreme Court of Missouri...," no procedures have been established and no lawyers have been certified as specialists. (*Counsel's note*)

3. "Appellate Practice"
4. "Bankruptcy"
5. "Commercial Law"
6. "Corporation Law and Business Organizations"
7. "Criminal Law"
8. "Eminent Domain Law"
9. "Environmental Law"
10. "Family Law"
11. "Financial Institution Law"
12. "Insurance Law"
13. "International Law"
14. "Labor Law"
15. "Local Government Law"
16. "Military Law"
17. "Probate and Trust Law"
18. "Property Law"
19. "Public Utility Law"
20. "Taxation Law"
21. "Tort Law"
22. "Trial Practice"
23. "Workers Compensation Law."

No deviation from the above phraseology will be permitted and no statement of limitation of practice can be stated.

If one or more of these specific areas of practice are used in any advertisement, the following statement must be included in the same advertisement in print size at least equivalent to the largest print used in setting forth the areas of practice:

"Listing of the above areas of practice does not indicate any certification of expertise therein."

ADOPTED BY THE ADVISORY COMMITTEE. MISSOURI BAR ADMINISTRATION ON NOVEMBER 13, 1977.

DR 2-102 Rule 4 Of The Supreme Court Of Missouri

(A) A lawyer or law firm shall not use professional cards, professional announcement cards, office signs, letterheads, or similar professional notices or devices, except that the following may be used if they are in dignified form:

* * *

(2) A brief professional announcement card stating new or changed associations or addresses, change of firm name, or similar matters pertaining to the professional offices of a lawyer or law firm, which may be mailed to lawyers, clients, former clients, personal friends, and relatives. It shall not state biographical data except to the extent reasonably necessary to identify the lawyer or to explain the change in his association, but it may state the immediate past position of the lawyer. It may give the names and dates or predecessor firms ina continuing line of succession. It shall not state the nature of the practice except as permitted under DR 2-105.

STATEMENT OF THE CASE

On January 2, 1980 the Advisory Committee of the Missouri Bar[1] filed a four-count information (A-18) in the Supreme Court of Missouri, charging the appellant with violation of the rules of that court having to do with advertisements by lawyers.

Counts I, II and IV of the Information charged violation of DR 2-101(B) of the Supreme Court of Missouri, *supra* p. 2, because of advertisements in a suburban newspaper and in the "Yellow Pages." The advertisement which is the subject of Count IV is fairly typical of those declared on in all three counts, and of the kind of advertising the appellant proposes to use in the future. (A-25). It was published in the August, 1978 Yellow Pages for Metropolitan St. Louis, which circulate in both Missouri and Illinois, and reads as follows:

J_____, R_____ M.

.Corporate
.Partnership
.Real Estate
.Tax
.Bankruptcy
.Probate
.Contract
.Anti-Trust
Labor
.Criminal
.Aviation
.Securities - Bonds

.Personal Injury
.Trials & Appeals
.Wills, Estate Planning
.Pension & Profit Sharing Plans
Workmen's Compensation
.Divorce, Separation
.Custody, Adoption
.Zoning & Land Use
.Entertainment/Sports
.Food, Drug and Cosmetic
.Communication

(Listing of the Above Areas Does Not Indicate Certification Therein)

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[1] The Advisory Committee is a standing committee of the Supreme Court of Missouri, established by that court's Rule 5. It has the responsibility for prosecuting disciplinary proceedings and for giving formal and informal opinions on the Canons of Professional Responsibility as set out in Rule 4 of that court.

Admitted to Practice Before
THE UNITED STATES
SUPREME COURT

Licensed in: MISSOURI & ILLINOIS

120 South Central 721-2000

The Information charged that this rule violated DR2-101(B)

"in that said advertisement lists Courts in which the appellant is admitted to practice and lists areas of law which are not approved for advertising purposes. ..."

Three portions of the advertisement were challenged, as follows: (i) "Admitted to Practice before the United States Supreme Court;" (ii) "Licensed in Missouri and Illinois;" and (iii) the listing of fields or areas of law which differ from those listed in the Advisory Committee Addendum to DR 2-101-(B), *supra*, p. 4.

The appellant's advertisement in the August, 1978 Yellow Pages (A-25, Exh. 14), lists 23 areas of law. Of these four are in the exact language of the Advisory Committee Addendum[4] and are as follows:

BANKRUPTCY

ANTI-TRUST

LABOR

CRIMINAL

In some other instances, there was a variation as to the language used, as follows:

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[4] Unless the word "Law", which we consider to be unnecessary and redundant, is considered by the Advisory Committee to be an essential part of the designation of each field or area of law.

Appellant	Advisory Committee
CORPORATE PARTNERSHIP	CORPORATION LAW AND BUSINESS ORGANIZATIONS
REAL ESTATE	PROPERTY LAW
PROBATE	PROBATE & TRUST LAW
PERSONAL INJURY	TORT LAW
TRIALS & APPEALS	TRIAL PRACTICE APPELLATE PRACTICE
WORKMEN'S COMPENSATION	WORKERS COMPENSATION
DIVORCE-SEPARATION CUSTODY-ADOPTION	FAMILY LAW

Eight other areas of law listed by the appellant are not listed in any manner by the Advisory Committee in its Addendum, namely:

CONTRACTS

AVIATION

SECURITIES-BONDS

PENSION & PROFIT SHARING PLANS

ZONING & LAND USE

ENTERTAINMENT/SPORTS

FOOD, DRUG & COSMETIC

COMMUNICATIONS

It is stipulated that all of the fields and areas of law listed by the appellant are included among those listed by the American Bar Association in its 1979-80 Directory.

Counts I and II of the Information (A 16-17) are similar to Count IV, but they also include the charge that the appellant's advertisements did not include a disclaimer of certification of expertise, as required by the Advisory Committee Addendum. Although the appellant included a disclaimer in his later advertisements, we challenge the requirement of disclaimer in the context of DR 2-101-B as construed by the court below, since the exact words are prescribed and no explanation is permitted.[5]

Count II (A-17) charged violation of DR 2-102(A)(2) because of the mailing of announcements to "persons other than lawyers, clients, former clients, personal friends and relatives." The announcement in question (A-24, Exh. 11) reads as follows:

R_____ M. J_____
Formerly with the United States
Securities and Exchange Commission

IS PLEASED TO ANNOUNCE THE OPENING OF HIS OFFICE FOR THE GENERAL PRACTICE OF LAW

Suite 1404
Chromalloy Plaza

SAINT LOUIS (CLAYTON) MISSOURI 63105

(314) 862-4321

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[5] Appellant did not learn of the requirement of a disclaimer until he received the General Chairman's letter of December 19, 1977. (A-24). He tried unsuccessfully to stop publication of the newspaper advertisement which he had ordered in October of 1977, which was intended to be published in December of 1977, but which through mistake of the publisher was not published until January of 1978. (A-24) He also tried unsuccessfully to hold up the Yellow Pages advertisement which he had contracted for on November 3, 1977. (*Id.*). See discussion in dissenting opinion of Judge Seiler, (A-8.) Discipline for failure to include a disclaimer which was not required at the time the advertisements were contracted for raises serious problems of due process.

Appellant, in his return to the Information (A-19), relied on the First Amendment, stating that he

> Under the First and Fourteenth Amendments to the Constitution of the United States has the constitutional right to publish an advertisement setting forth the fields of law practiced in meaningful and understandable language to the layman, without restriction as required by the wording of the Advisory Committee Memorandum, and also has the constitutional right to list in an advertisement the courts before which he is licensed to practice
>
> "... has the constitutional right to distribute an announcement containing the material set out in Count III of the Information to any persons he chooses, without restriction to lawyers, clients, former clients, personal friends and relatives..."

The return also charged violation of the Commerce Clause of Article I, Section 8 to the extent that the rule prohibited a statement, in a telephone directory which circulated in both Missouri and Illinois, that the appellant is licensed to practice in both of those states.

The case was submitted to the court on the basis of stipulated facts. The court below ordered that the appellant be reprimanded, and that he pay the costs of the action. The majority opinion (A-1) is cryptic, but it is clear from reading that opinion in the context of the pleadings and the dissenting opinions that the court below construed its rules as forbidding the inclusion in advertisements of matter which is not specifically approved, that it upheld its rules against all constitutional challenges raised, and that it found violation of all four counts of the Information. As to the constitutional points, the opinion stated: (A-2)

> We are urged now by [appellant] to follow the *Central Hudson* model. We respectfully decline to enter the thicket of attempting to anticipate and to satisfy the *subjective ad hoc* judgments of a majority of the justices of the United States Supreme Court.

Chief Justice Bardgett (A-5) and Judge Seiler (A-7) dissented.

2. **The History Of The Missouri Rules**

Following the decision in *Bates* v. *Arizona,* 433 U.S. 350, (June 27, 1977), the court below directed its Committee on Ethics and Professional Responsibility (a different body from the Advisory Committee) to draft proposed amendments to its rules governing legal advertising. That Committee reported on September 27, 1977. Its transmittal letter is included A-27. It proposed amendment of Missouri's DR 2-101, which was identical to the Arizona rule struck down in Bates. The Committee recommended the essential plan of Proposal A of the American Bar Association, which listed 25 categories of information which were considered appropriate in lawyers' advertisements in the printed media.[6] The Committee, however, recommended that this list be cut to nine items. It recommended no change in DR 2-102-(A)(2), which deals with the use of the mails by attorneys in publicizing matters relating to their practice.

On October 24, 1977 the court below issued an amended DR2-101, adopting the Committee's report in substance, but adding a tenth category of permissible information. The amended rule, *supra* p. 2, was published in the December, 1977 Missouri Bar Journal and became effective by its terms on January 1, 1978. (A-23)

The Advisory Committee Addendum, *supra* p. 4, was adopted November 18, 1977 and was published in the Missouri Bar Journal for January-February 1978. (A-24) It provided that:

"No deviation from the above phraseology will be permitted and no statement of limitation of practice can be stated."

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[6] For discussion of Plan A, see In re Petition for Rule of Court Governing Lawyer Advertising, 564 SW2d. 638, (Tenn., 1978; Lori B. Andrews, *Birth of a Salesman: Lawyer Advertising and Solicitation,* A.B.A. Press, 1980.

The Advisory Committee issued no accompanying report or other statement explaining why it chose certain areas and designations, and not others. There have been minor modificatons in the Areas from time to time,[7] but the addendum is now in force substantially as reproduced above.

3. The Appellant's Advertising

Appellant graduated from John Marshall Law School in 1973 and was admitted to the bar in both Missouri and Illinois that same year. He spent several years in Washington, D.C. and, during part of that time, was employed by the Securities and Exchange Commission. He moved to Saint Louis, Missouri and in April of 1977 opened a law office, practicing alone. (A-23)

The appellant, following *Bates,* sent out simple "tombstone" announcements, as pictured above, to a restricted list of addressees (A 24-5).[8]

Also following *Bates* the appellant placed advertisements in several suburban newspapers, including the Jewish Light. No advertisement which appeared prior to January 1, 1978 is the subject of a charge in the Information. (A-23)

In the latter part of October, 1977, the appellant entered into a contract for the insertion of an advertisement in the West End Word, a newspaper published in St. Louis on a monthly or bimonthly basis. (A-24) This advertisement is the subject of Count I of the Information and, except for the absence of a

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[7] "Tort Law" has been changed to "Negligence Law." "Family Law" has been changed to "Domestic Relations Law."

[8] There was a factual issue as to whether the appellant caused announcements to be sent to people he did not know personally, which was not expressly resolved by the court below except by the result reached, which necessarily demonstrates that the issue was resolved adversely to the appellant. (A24-25.)

disclaimer, is essentially similar to the advertisement declared on in Count IV and set out at page 7, *supra.*[9]

On November 3, 1977, appellant entered into a contract for the insertion of an advertisement in the Yellow Pages of the Saint Louis Suburban Telephone Directory. This advertisement appeared in the February, 1978 Yellow Pages, and is also essentially the same as the Court IV advertisement[10] except for the omission of the disclaimer. (A-24)

On November 3, 1977, Harold W. Barrick, General Chairman of the Advisory Committee, wrote appellant with regard to the advertisement in the Jewish Light, as follows: (Stip., Exh. 1.):

> "... This advertisement is in complete violation of the Code of Professional Responsibility in Missouri as it now exists and also is in violation of the rule governing lawyer advertising adopted by the Supreme Court of Missouri to be effective January 1, 1978. I suggest that you immediately see that this ad is deleted from further issues of the newspaper and wait until all of the rules and regulations concerning lawyer advertising, which only become effective on January 1, 1978, are promulgated."

At the time this letter was written Missouri had no regulation of printed advertising except for the pre-Bates rule.

Appellant replied to the General Chairman's letter on November 15, 1977, (Stip., Exh. 5), expressing the opinion that the Jewish Light advertisement constituted protected speech under *Bates.* He again wrote the General Chairman on December 16, 1977, (Stip., Exh. 6), requesting that the Advisory Committee "specifically approve the display advertisement which you indicate you have." The letter continued as follows:

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[9] See Note 5, *supra.*

[10] See Note 5, *supra.*

> I cannot rescind any previous contractual advertising arrangements made, but I shall defer any future display newspaper advertisements of the type previously published from this day forth for a reasonable time until I receive an opinion specifically on my advertisement. I hope the matter may be promptly resolved.

The General Chairman responded to both of these letters on December 19, 1977, (Stip., Exh. 7), apologizing for not having answered sooner and going on to state that "your display ad does not meet the requirements of the rules on advertising." He enclosed a copy of the Advisory Committee Addendum, which had not then been published and with which the appellant was previously unfamiliar. The letter continued as follows:

> Please note further that the rule requires only use of the specific phraseology adopted by the Advisory Committee. Many of the matters do not appear in the approved list of areas of law. In addition, neither the rule adopted by the Supreme Court of Missouri or the addendum adopted by the Advisory Committee allows an attorney to state what courts he is admitted to practice in. I trust that your advertisements after January 1 (which is the first day that you can place an advertisement without violation of the rules of the Supreme Court of Missouri) will comport with the rules previously adopted.

Appellant seeks to continue his practice of advertising in the Yellow Pages, with insertions similar in form and content to the example quoted above. He takes the position that he has the constitutional right to do this, and that the rules of the court below deprive him of freedom of expression in violation of the First and Fourteenth Amendments, to the extent that they deprive him of this right.

SUMMARY OF THE ARGUMENT

1. Appellant was disciplined by the court below for publishing in a newspaper and in the Yellow Pages an advertisement which is conceded to be accurate and not misleading, because the advertisement listed the courts in which he was admitted to practice, and listed fields or areas of law which had not been approved for advertising purposes. The advertisements were held to violate DR2-101(B) of the court below, which lists the ten categories of information permitted in lawyers' advertisements in the printed media and prohibits the inclusion of any other information in lawyers' advertising. This rule is in violation of *Bates* v. *Arizona,* 433 U.S. 350 (1977), which holds that lawyers have the constitutional right to make use of truthful, factual and non-misleading advertising in informing the public of their availability and of the services they provide. It also violates the holding of *Central Hudson Gas and Electric Company* v. *New York Public Service Commission,* 447 U.S. 557 (1980), in that it is not narrowly drawn and is far more restrictive of freedom of expression than is necessary to serve the proper governmental purpose of protecting the public against deceptive or misleading advertising. The rule operates as a prior restraint and censorship, in violation of the First Amendment.

2. The appellant has the constitutional right to advertise the courts in which he is admitted to practice, including this Court. The burden is on the regulatory authorities to show some reason why this information may not be included in lawyers' advertising, and none has been shown. The appellant also has the First Amendment right to list the fields or areas of law in which he practices, using accurate and non-misleading designations of his own choosing. The Advisory Committee Addendum to DR 2-101(B), providing that certain recognized fields or areas of law may not be listed in any manner in lawyers' advertisements, and that other fields or areas may be listed only in the exact language set out in the Addendum, contravenes the First Amendment. Appellant also has the right, under the Commerce Clause, to list

the fact of admission in two states in a telephone directory circulating in both of those states.

3. Appellant was also disciplined for mailing a simple tombstone announcement of the opening of his law office to a married couple who asserted that they were not acquainted with him, pursuant to DR2-102(A)(2) of the court below, a pre-Bates rule which permits the mailing of announcements only to "lawyers, clients, former clients, personal friends, and relatives." The restrictions of this rule are contrary to the holdings of *Bates* and *Central Hudson, supra,* in that the rule forbids the dissemination by mail, of truthful and factual information about a lawyer's availability without any showing of a significant governmental interest in limiting the use of this medium. There is no logical reason why the same advertisement which can be published in a newspaper could not be sent through the mail to members of the general public with whom the lawyer is not acquainted. Two state courts of last resort have so held. The rule of the court below, limiting the class of addressee to whom such announcements may be sent, is far more restrictive than is necessary to serve any proper governmental purpose.

ARGUMENT

I. A Disciplinary Rule Which Sets Out An Exclusive List Of Items Which May Be Included In Lawyers' Advertisements In The Printed Media, And Which Prohibits The Inclusion Of Other Items Even Though Concededly Accurate And Not Misleading, Violates The First Amendment.

There is no contention that the appellant's advertising in the printed media is in any respect untruthful, inaccurate or misleading. The appellant was not charged with violation of DR2-101(A), which prohibits advertising

> "respecting the quality of legal services or containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim."

The appellant is charged in Counts I, II and IV for publishing truthful information, simply because the information is not authorized by the express language of DR 2-101(B). The court below necessarily accepted the Advisory Committee's contention that the rule prohibited advertisements containing any items which were not specifically listed. Otherwise there would have been no basis for discipline.

DR 2-10-(B) is in plainest violation of the holding of *Bates* v. *Arizona*, 433 U.S. 350 (1977). *Bates* held that a blanket prohibition on advertising by lawyers violated the First Amendment. The *Bates* opinion dealt primarily with price advertising for routine legal services, which is a problem not involved in this case. Bates, however, gave attention to the other items included in the advertisement before the court and illustrated in the official reports, and found that they were protected by the First Amendment. The opinion specifically approved the description of the Bates-O'Steen operation as a "Legal Clinic," and held that they had the right to advertise "Legal Services for Very Reasonable Fees." This latter statement is not capable of categorical proof, and goes well beyond anything contained in

the appellant's advertisements. The thrust of the *Bates* opinion is that lawyer advertising which is factual and not misleading is protected speech under the First Amendment.

Bates recognizes that there is a public interest in reasonable regulation of legal advertising, but holds that such regulation must serve a proper governmental purpose. The opinion suggests permissible regulation along the following lines:

(1) Prohibition of advertising that is deceptive or misleading;

(2) Limited supplementation by way of warning or disclaimer;

(3) Reasonable restrictions as to time, place and manner of advertising;

(4) Consideration of the special problems of the electronic media.

(5) Regulation of claims respecting the quality of legal services.

The enumeration of these particulars demonstrates quite clearly that the Court cannot sustain a blanket regulation such as Missouri has attempted. Not one line in *Bates* gives any support to the scheme of regulation attempted in DR 2-101(B). That rule, indeed, would prohibit advertising containing some of the items included in the *Bates* ad, simply because these are not specifically authorized. The *Bates* ad had a logo of the scales of justice, a statement "Do you need a lawyer?", a statement in the last line, "Information regarding other types of cases furnished on request," and, finally, fees for services such as "legal separation" and "preparation of all court papers and instructions on how to do your own simple uncontested divorce," which are not listed in DR2-101(B)(10). The conflict with this controlling decision is patent.

Decisions of this Court following *Bates* also show that the Missouri rule cannot stand. *In re Primus*, 436 U.S. 412, 438 (1978) dealt with mail solicitation rather than with advertising,

but the opinion called for "narrowly drawn" rules and "carefully tailored" regulations which restrict freedom of expression no more than is necessary to serve a proper governmental interest. The Missouri rule is open-ended, and in no sense is it narrowly drawn.

The most recent decision building upon Bates is *Central Hudson Gas and Electric Corporation* v. *New York Public Service Commission*, 447 U.S. 557, 560 (1980), in which this Court set out a four-part test for regulation of commercial speech, as follows:

> "...At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it must at least concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, *and whether it is not more extensive than is necessary to serve that interest.*" (Emphasis supplied.)

The Court at page 565 reiterated the injunction of Primus that restrictions on freedom of expression must be "narrowly drawn."

As will be shown in greater detail below, the appellant's advertisements "concern lawful activity and are not misleading." They are, therefore, entitled to the protection of the First Amendment.

The Missouri regulation utterly fails under the fourth point of the *Central Hudson* test, since it is not narrowly drawn to give protection against perceived evils, but rather regulates speech that is clearly protected in the hope of achieving control over unprotected expression as a byproduct. This is an exact parallel to the plan of regulation condemned in *Central Hudson*, where

the Public Utility Commission had banned all advertising which tended to create a demand for electricity in an attempt at promoting conservation of energy. A rule which strikes at valid and potentially beneficial expression in order to regulate expression deemed to be harmful is manifestly invalid.

The *Central Hudson* analysis applies to commercial speech of all types, including lawyers' advertisements. The strong reliance the opinion placed on Bates and Primus is sufficient to show that lawyer advertising is no exception to the *Central Hudson* rule.

The court below did not make the slightest attempt to follow or to distinguish *Central Hudson*. Instead it petulantly refused to consider that case, while suggesting that the Missouri rules were valid under *Bates* and that *Central Hudson* represented a departure. In so holding the court below was mistaken. *Central Hudson* does not depart from Bates, but rather builds upon it.

Since the case is so fully controlled by decisions of this Court there is no need to discuss lower court opinions in detail.[11] *Durham* v. *Brock*, 498 F. Supp. 213, (M.D. Tenn.,

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[11] Holdings consistent with our contentions are Bolton v. Kansas State Board of Healing Arts, 473 F. Supp. 728, (D.C. Kan., 1979), holding that a state could not prohibit truthful and factual advertising by chiropractors; In re Florida Bar, 380 So. 2d. 435, (Fla., 1980), adopting the American Bar Association's less restrictive Plan B; Princeton Community Phone Book, Inc. v. Bate, 582 F. 2d. 706, (3d Cir., 1978).

In re Mountain Bell Directory Advertising, 604 P. 2d. 760, (Mont., 1979), recognized the right of lawyers to list the areas of law practiced, but held that separate classified telephone directory listings for 30-odd fields of law were misleading, in indicating that all of the lawyers listed were of special and equal competence in the areas listed.

Eaton v. Supreme Court of Arkansas, 607 SW 2d. 55, (Ark., 1980), cert. den. ____ U.S. ____ (1981) upheld disciplinary action against lawyers who included an advertisement in a book of coupons, mostly coming from merchants. The decision is supportable on the ground that the public might get the misleading impression that the lawyers' services were being offered on a bargain or discount basis.

1980) is of particular interest because it involves a court rule which is very much like the Missouri rule. The Supreme Court of Tennessee adopted a rule which prohibited the listing of fields or areas of law practiced, except in connection with the listing of fees charged for routine legal services. The district court held that the rule was unconstitutional under *Bates* because it prohibited the dissemination of truthful information, and went beyond the necessities of the situation. The opinion was handed down before *Central Hudson*, but contains an interesting anticipation of that holding.

A principal fault in Missouri's plan of regulation is that it "serves only to restrict the information that flows to consumers," (*Bates*, 367), and ignores the precept that "the preferred remedy is more disclosure, rather than less." (*Id.*) The attorney, under the rule, is absolutely prohibited from including in advertisements information which he considers to be of interest to the public, simply because the framers of the rule have not seen fit to give express approval to that information. He is limited to the boiler plate. The rule permits only "...an advertisement limited to ... spartan fare," which "provides scant nourishment." (*Id*, 367.) The Missouri authorities have done their best to adopt a rule which permits no meaningful advertising at all.[12]

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[12] The effect of DR2-101(B) in stifling creative and helpful advertising is illustrated in the Amicus brief of Arnold T. Phillips, Jr. filed in this case. Phillips published an advertisement in which he sought to inform the public about the benefits which might be available under Chapter 13 of the amended Bankruptcy Act. Such information might be very helpful to a person beset by an unsurmountable burden of debt, and uninformed as to legal remedies. Under the Missouri rule, however, this information cannot be conveyed to the public in an attorney's advertisement, for the reason that the rule does not specifically authorize it. A rule so designed does not serve the informative function which *Bates* considered to be so important. See Andrews, *op. cit.* Note 5, p. 43, observing that many state rules "restrict attorneys from advertising the type of information that would be most useful in helping the average citizen decide whether his problem required legal services and who best could provide those services."

The rule may operate in a way that is positively misleading. An attorney who chooses to list the areas of law practiced must include a disclaimer of "certification of expertise." Even though Bates suggested that a requirement of "some limited supplementation, by way of warning or disclaimer or the like," might be required, the disclaimer prescribed by the Advisory Committee Addendum is in and of itself misleading, in the context of the Missouri rule. This is because Missouri would not permit a lawyer to advise the public that the Missouri Bar does not at present certify expertise or specialists of any kind. A person reading an advertisement with the required disclaimer might get the false impression that the advertiser lacked a credential which other attorneys possessed. The denial of opportunity for explanation or clarification goes beyond the necessities of the case and is constitutionally infirm.

The Missouri rule, furthermore, is inconsistent with the entire course of decisions of this Court giving effect to the First Amendment. The essence of freedom of expression consists of freedom to choose one's own language. Missouri's rule virtually establishes a conclusive presumption that any lawyer advertising which is not expressly allowed by its rule is misleading. This manifestly is a prior restraint. It is inconsistent with the holding of *Freedman* v. *Maryland,* 380 U.S. 51, (1965), that the governmental authority has the burden of showing that any restrictions on First Amendment rights are justified, and cannot shift that burden to the speakers. It violates the holding of *Consolidated Edison Company of New York, Inc.* v. *New York Public Service Commission,* 447 U.S. 530 (1980), that restrictions on freedom of expression "may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest." The rule, in sum, is an unprecedented and unconstitutional restriction of First Amendment rights.

II. Appellant Has The Constitutional Right To List In Advertisement (i) The Courts In Which He Is Admitted To Practice And (ii) The Fields Or Areas Of Law In Which He Practices.

Any suggestion that a lawyer who is licensed in Missouri and Illinois cannot advise the public that he is so licensed, in a telephone directory which circulates in both states, is utterly refuted by Bates and Central Hudson. This information would surely be helpful to a person who is looking for a lawyer and who would like to find one who can take care of his legal needs.[13]

We are mindful of the question raised by Judge Seiler in his dissenting opinion (A-9) about the appellant's statement that he is "Admitted to practice before the Supreme Court of the United States." A lawyer, however, should be able to inform the public of this truthful item, and allow the public to decide what weight to give it. Admission to the bar of this Court, under

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[13] Strange to say, Missouri's DR2-102(D) requires a listing on the letterhead of a firm of attorneys which has offices in more than one state of the jurisdictions in which the several members and associates are admitted to practice, unless all persons on the letterhead are admitted in all of the states in which the firm lists offices.

Apart from the First Amendment issue, Missouri's discipline of appellant for advertising his licensing in both states is also infirm under the Commerce Clause, (Art. I, Sec. 8). A state may not regulate the services provided by a licensed professional in neighboring states. *Bigelow* v. *Virginia*, 421 U.S. 809, 824 (1975), and it "may not, under the guise of exercising internal police powers, bar citizens of another state from disseminating information about an activity that is legal in that state." *Id.*, p. 824. Missouri's attempt to eliminate from the St. Louis Yellow Pages the truthful information that certain attorneys are licensed to practice in Illinois, when one of the principal purposes of the directory is to facilitate the interstate exchange of such information, is a direct and unlawful burden on interstate commerce.

Rule 5, requires three years of practice and an application supported by references from members of the bar of the Court. One so admitted may publish the fact by framing the certificate furnished him. The fact of admission is regularly listed by attorneys in standard legal directories, which are freely available at public libraries. A person who might want to litigate a constitutional issue or to help a relative or friend in seeking habeas corpus might be interested in knowing about a lawyer's admission to the bar of this Court. Surely as many users of the telephone directory would be interested in this fact as would be interested in knowing that a lawyer practices "International Law," which is one of the areas approved for advertising by the Advisory Committee. But we need not reach this point. Nothing in the existing rule expressly forbids a lawyer to list the fact of his admission to the bar of this Court. The prohibition is found only from the absence of express authorization. If Missouri believes that there is good reason for forbidding such a listing then, under *Central Hudson,* it should adopt a specific rule and see whether the rule could stand constitutional scrutiny.[14] Or it could allege that the statement is "self-laudatory" under DR2-101-(A), in specific charges brought under that rule. We doubt that either of these strategies would succeed, in this particular instance, but it is not necessary to explore this issue further. The rule under which the appellant was charged simply cannot support the discipline imposed. Any contrary conclusion would sanction broad, blanket rules going little beyond the pre-*Bates* rule, and would then force lawyers to defend any part of a publication which later strikes the regulatory authorities as undesirable. The "narrowly drawn" requirement of *Primus* and *Central Hudson* precludes such blanket rules.

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[14] See, e.g. Friedman v. Rogers, 440 U.S. 1, (1979), sustaining a specific prohibition against the use of trade names by licensed optometrists.

The Advisory Committee approved the listing of 23 areas of law for advertising purposes, but gave no explanation as to why some areas where chosen and other excluded. The following observations are appropriate:

(1) There is no limitation on the number of areas which a lawyer may list. One so disposed could list all 23 of the approved areas without violating the rule.

(2) An attorney does not have to have any experience in an area he chooses to list.

(3) The approved areas cannot be justified on the ground that they are the basic or fundamental areas of general practice. The Advisory Committee permits the listing of "Anti-Trust Law," "Financial Institutional Law," "International Law," and "Public Utility Law," which are hardly staples of general practice.

(4) There is no provision for application to the Advisory Committee for permission to list an area of law not set out in the Addendum.

(5) Inasmuch as the Missouri Bar does not have any kind of program for the certification of specialists, there is no occasion to decide whether a state which did certify specialists could adopt a rule prescribing the exact language to be used in the description of the specialty. The Addendum indicates clearly that a lawyer, by indicating the areas in which he practices, may not hold himself out as a specialist, and must so state.

The Addendum is in plain violation of *Bates* and *Central Hudson*. The appellant, who has worked as a lawyer for the Securities and Exchange Commission, is not allowed to tell the public that he handles "Securities-Bonds." He is not permitted to say that he is available for "Contracts," or for "Zoning-Land Use" matters. This is the effect of the Addendum, as applied by the court below, even though the areas listed by the appellant in his advertisement are set out by the American Bar Association in its 1979-80 Directory.

The specification of the exact language which must be used is likewise unjustifiable. The appellant told the public that he was available for "Personal Injury" matters. The term he used is accurate, descriptive, and generally understood. There has been no suggestion of any legitimate reason why it cannot be used in advertising. The Advisory Committee first told the appellant that the appropriate term was the highly legalistic designation, "Tort Law," which is certainly not a household expression. Later the designation was changed to "Negligence Law," which, in this era of strict liability, does not accurately describe the range of actions for personal injury. Appellant is not allowed to say, "Real Estate," which is a term in common usage, but must say, "Property Law." The lawyer may not say "Divorce-Separation-Custody-Adoption." The term initially approved was "Family Law," and this was later changed to "Domestic Relations." Examples need not be multiplied. The Addendum, making use of an unprecedented form of regulation, tells lawyers the exact words they must choose if they propose to advertise areas of law in which they practice. The concededly valid purpose of making sure that areas of law are described accurately can effectively be served by a regulation which allows the advertisers to select their own designations and imposes sanctions only if the designations are shown to be misleading.

The Addendum is doubly at fault. It absolutely prohbiits references to some recognized fields or areas of law, simply by not listing them. It also denied lawyers the right to use descriptions which are clear and understandable, and in no way misleading or confusing, by prescribing its own rigid formulations and forbidding any deviation.

Unless the judgment below is reversed, appellant cannot continue to publish truthful, factual advertisements such as the one illustrated at page 8, *supra,* without putting his license in jeopardy.

III. A Rule Prohibiting The Mailing Of Announcements Of The Opening Of A Law Office To Persons Other Than "Lawyers, Clients, Former Clients, Personal Friends And Relatives" Conflicts With The First Amendment.

This point is limited to the proposition that the same advertisement which may be published in a telephone directory or a newspaper may be transmitted by mail, and that a rule permitting mailing of legal advertisements only to certain classes of addressee, and prohibiting mailing to the general public, transgresses the First Amendment. The point was expressly preserved in the return to the information, and implicitly rejected by the court below in its opinion sustaining the constitutional validity of all of its rules governing legal advertising. Both of the dissenting opinions (A-6) and (A-10) agree with our position. Factual issues as to whether the appellant caused announcements to be mailed to persons he did not know need not be discussed at this stage of the case.[11]

The appellant's announcements were in simple "tombstone" form, without descriptive matter. The announcement contained no material which was not within the compass of DR2-101(B), as described in our first point, except for a statement of the appellant's former association. There is nothing in the record to indicate that the appellant was aware of any pending legal needs of the addressees, or that they had any immediate legal business. There is no necessity, therefore, to explore the significance of any distinction between "advertising" and "solicitation," as discussed in *Koffler* v. *Joint Bar Association*, 51 NY2d. 140, 412 NE 2d. 927, (1980), cert. den. ____ U.S. ____ (1981).

Count III of the Information was based on DR2-101-(A)(2), which was retained without change in the October, 1977 revision of the advertising rules of the court below in response to *Bates*. The Committee on Professional Ethics and Responsibility gave no atte on to the question of mailed advertising, as opposed

[11] See note 7, *supra*

to advertising in the printed media. The Committee did make an express recommendation against permitting "electronic media advertising, billboards or handbills," (A-29), but its transmittal letter is silent about mailed advertising. The rule relied on, then, does not represent a studied determination that there are dangers in the mailing of lawyers' advertisements which are not present in advertisements in the printed media. Count III is based on a rule which was framed at a time when it was assumed that a blanket prohibition of legal advertising was perfectly valid.

The majority opinion below, which amounts to little more than a conclusion, is completely silent on the issue of validity of DR 2-101(A)(2). The issue, however, was clearly presented by briefs and arguments and was necessarily decided adversely to the appellant in the resolution of the case. The dissenting opinions of Chief Justice Bardgett (A-6) and Judge Seiler (A-10) give testimony to the court's consideration of the issue. Judge Seiler said:

> Nor do I believe we can constitutionally prohibit lawyers from using first class mail to send out the same information they could put in a newspaper advertisement.

The proposition he announces is eminently sound and is supported by a uniform course of authority beginning with Bates.

In *Kentucky Bar Association* v. *Stuart,* 568 SW 2d. 932 (1978), two partners sent a letter to local real estate agents, listing their fees for title examination and preparation of conveyances. The local disciplinary authorities brought charges against them under a rule which is substantially the same as Missouri's DR2-101(A), and which was apparently not modified following Bates. The Supreme Court of Kentucky unanimously held that the same advertisement which could be published in a newspaper could be sent by mail. The court said, furthermore, that the addressing of a letter to persons who might have need for the legal services described, or who might come into contact with others who had such a need, could not be construed as an

impermissible solicitation such as was found to be subject to regulation in Ohralik v. Ohio, 436 U.S. 477 (1978). The present case, of course, involves absolutely nothing that could be branded as solicitation.

Similarly, the New York Court of Appeals in *Koffler* v. *Joint Bar Assocation, supra,* held that truthful and non-misleading circulars sent through the mail could not be the subject of disciplinary action for improper advertising. The case involved two attorneys who mailed several thousand circulars to real estate brokers and to persons who were assumed to be in the process of selling their homes. The circulars described the available services and fees charged. The Appellate Division, 420 NYS 2d. 560, (1980), adjudged discipline on a finding that the circulars constituted impermissible solicitation rather than proper advertising. It did not dispute the proposition that mailed advertisements by lawyers were constitutionally protected. The Court of Appeals reversed on the authority of *Bates* and *Central Hudson,* and this court denied certiorari.

The Court of Appeals noted that restrictions on commercial speech can be no more extensive than is necessary to achieve a proper regulatory purpose. It characterized the legitimate public interest in regulating legal advertising as that of "prevention of deception," and said that there was no reason to believe that mailed announcements had greater potential for deception than did advertising in the printed media. To the suggestion that mailed advertisements are more private than printed ones so that improprieties might not so readily be noticed, the court replied that there could be means of regulation less restrictive than blanket prohibition, such as requiring that copies of mailed advertisements be filed with the regulatory authorities. The court observed that the distinction between advertising and solicitation drawn by the appellate division was artificial when applied to a mass mailing such as the lawyers in the case made use of.

We agree with the highest courts of Kentucky and New York that, under *Bates* and *Central Hudson*, the prohibitory features of DR 2-101-(A)(2) cannot stand. *Bates* of course did not deal directly with advertising by mail. It is, however, grounded on the theory, implicit in the First Amendment, that wide dissemination of information about goods and services is desirable and in the public interest. See also *Buckley* v. *Valeo*, 424 U.S. 1 (1976), calling for "exacting scrutiny" of restrictions on First Amendment rights.

The First Amendment right of free expression extends to the use of the mails. *Hannegan* v. *Esquire*, 327 U.S. 146 (1946); *Consolidated Edison Company of New York* v. *New York Public Service Commission*, 447 U.S. 530 (1980). The latter case held that the state could not justify a restriction on mailings by setting up a presumed privacy interest on the part of the addressees. Any such right of privacy must be claimed by the addressees themselves, under precise regulations such as were approved in *Rowan* v. *Postal Service*, 397 U.S. 728 (1970). *In re Primus*, 436 U.S. 412 (1978) observes that a mailing does not have the potential for overbearing conduct or harassment such as may attend personal solicitation as described in *Ohralik*, decided the same day. We are aware of no case which sustains a prior restraint on mailings.

The appellees can take no comfort from the statement in Bates that there may be "reasonable" regulation of the "time, place and manner of legal advertising." That opinion gives express recognition to the "special problems of advertising in the electronic media." There is no indication that mailed advertisements present any special problems such as would justify prohibitory regulation. The normal rules governing restraints on freedom of expression, as discussed in our first point, apply to mailings.

There are affirmative reasons why a lawyer might want to use the mails in advertising. The law office might be located in a suburban or exurban community in which there is no local

newspaper, and the lawyer might feel that an advertisement in a metropolitan daily would be so buried among advertisements from other communities that it would not attract the attention of local residents. The lawyer who offers services which are required only by persons in a particular trade or business might believe that newspaper advertising would not be cost-effective, and there might be no available trade paper or journal. The justification for legal advertising, as enunciated in Bates, is inconsistent with a prohibition of the use of the mails, or with a prohibition on mailings to persons outside a specified class.

The First Amendment guarantees the right to use the medium of one's choice. Any restriction on the choice of media must find a very strong justification. This is implicit in *Linmark Associates, Inc.* v. *Willingboro Township,* 431 U.S. 85 (1977), holding that a local governmental unit could not prohibit the display of "for-sale" signs on houses. The laudable purpose of the ordinance was to discourage panic selling of houses in response to perceived changes in the racial composition of the area. The proponents argued that alternative means of expression, such as newspaper advertising, were available, but the Court held that such advertisements were characterized by "more cost and less autonomy." The Court found that the asserted benefits from the ordinance did not justify a restriction on First Amendment rights.

Neither the Committee on Ethics and Responsibility nor the court below has articulated any reason for the restrictions of mailings of legal advertisements. There is no constitutional justification for such a restriction.

CONCLUSION

The judgment should be reversed. Costs should be assessed against the appellees.

Respectfully submitted,

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